

FEDERAL COURTS

Najera-Rodriguez v Barr, 6/4/19 – CRIME NOT DIVISIBLE / REMOVAL VACATED

The petitioner was an LPR of the U.S. In 2016, an Illinois state court convicted him of unlawful possession of several Xanax pills without a prescription. The issue on appeal was whether the conviction made the petitioner removable. The answer depended on whether the criminal statute was divisible for purposes of applying the modified categorical approach. The Seventh Circuit held that it was not, granted the petition, vacated the removal order, and remanded to the BIA. Because the most reliable sources of state law did not provide a clear sign of divisibility, the reviewing court was permitted to look at the record of the prior conviction itself. For these purposes, charging documents must be used with care, because they often include factual details that are not elements of the crime, but provide the particulars of the charge. The instant accusatory instrument did not show whether the mention of alprazolam/Xanax was an essential element or a factual detail. The appellate court was reluctant to place too much weight on the charging document, in light of the defendant's sentencing document, which stated only that the sentence was the result of a negotiated plea of guilty for unlawful possession of a controlled substance under § 402(c), without specifying the controlled substance. Together, the charging and sentencing documents did not show that the identity of the controlled substance was an element of the offense. If the petitioner had known that the Board would consider the statute of conviction categorically to involve a federal controlled substance, he might have gone to trial or have pleaded guilty to a different statutory violation calling for additional incarceration, but less serious immigration consequences. The court added a note of caution. In applying the extensive body of law concerning collateral federal consequences of state convictions, lawyers for the federal government often urged federal courts to define the elements of state criminal offenses in particular ways that were essential or helpful in a particular case. If federal courts interpreted state law incorrectly, federal courts could mistakenly cast doubt on the much higher volume of state criminal prosecutions under those same state statutes. To reduce that risk, the federal appeals courts needed to insist on clear signals that convinced them to a certainty that the elements were correct and supported divisibility, before imposing additional federal consequences for those state convictions.

<https://cases.justia.com/federal/appellate-courts/ca7/18-2416/18-2416-2019-06-04.pdf?ts=1559682015>

BIA

Matter of Miranda-Cordero

27 I&N Dec 551 (BIA 2019) – *PEREIRA v SESSIONS* DISTINGUISHED

Pursuant to the INA, neither rescission of an in absentia order of removal nor termination of the proceedings is required where an alien, served with a notice to appear that did not specify the time and place of the initial removal hearing, failed to provide an address to which a notice of hearing could be sent. *Pereira v Sessions*, 138 S Ct 2105, distinguished.

<https://go.usa.gov/xmfVG>

Matter of Pena-Mejia

27 I&N Dec 546 (BIA 2019) – ***PEREIRA v SESSIONS DISTINGUISHED***

Neither rescission of an in absentia order of removal nor termination of the proceedings is required where an alien did not appear at a scheduled hearing, after being served with a notice to appear that did not specify the time and place of the initial removal hearing—so long as a subsequent notice of hearing providing such information was properly sent. *Pereira v Sessions* distinguished.

<https://go.usa.gov/xmfvw>

Matter of Guadarrama

27 I&N Dec. 560 (BIA 2019) – ***MATTER OF FERREIRA, 26 I&N DEC 415, REAFFIRMED.***

Where an alien has been convicted of violating a State drug statute that includes a controlled substance that is not on the Federal controlled substances schedules, he or she must establish a realistic probability that the State would actually apply the language of the statute to prosecute conduct involving that substance in order to avoid the immigration consequences of such a conviction.

<https://go.usa.gov/xmutz>

APPELLATE DIVISION

Guilty Pleas – Other Cases

People v Cattell, 5/22/19 – VALID WAIVER / SPECIFIC SENTENCE PROMISE

The defendant appealed from a judgment of Dutchess County Court, convicting him of 1st degree aggravated sexual abuse and other crimes. The **Second Department** affirmed. The waiver of the right to appeal was valid. The record showed that the defendant fully appreciated the consequences of the waiver and understood that it was separate and distinct from rights automatically forfeited upon his plea of guilty. He asserted that the waiver was invalid because he was not advised of the maximum permissible sentence. However, that was not required where, as here, there was a specific sentence promise at the time of the waiver. The valid waiver foreclosed review of challenges to adverse suppression rulings.

http://nycourts.gov/reporter/3dseries/2019/2019_03983.htm

People v Carroll, 5/30/19 – VOLUNTARINESS ISSUE / UNPRESERVED

The defendant appealed from a judgment of Clinton County Court, convicting him of 4th degree criminal sale of a controlled substance (two counts). The **Third Department** affirmed. There was no need to consider the validity of the appeal waiver, since the challenge to the voluntariness of the plea and related ineffective assistance claim survived a valid waiver. However, such issues were unpreserved for review, in the absence of an appropriate post-allocation motion. The reviewing court found unavailing the defendant's reliance on his unsworn statements, contained in a post-plea letter sent to County Court prior to sentencing—which contradicted his sworn plea allocution. The letter did not properly preserve the issue and did not constitute a motion to withdraw the defendant's guilty plea. Further, his pro se submission prior to sentencing was insufficient for preservation purposes, because he was represented by counsel and was not entitled to hybrid representation. Finally, the defendant's post-plea assertions of innocence were

unsworn and otherwise unsubstantiated. Thus, County Court was under no duty to further inquire prior to sentencing him to the recommended terms. Contrary to the defendant's assertion, he did not make any statements on the record that negated an element of the charged crime, were inconsistent with his guilt, or otherwise called into question the voluntariness of his plea. Therefore, the narrow exception to the preservation requirement was not triggered. To the extent that the defendant faulted counsel for failing to properly investigate his case, conduct more extensive discovery or explore possible defenses, these claims implicated matters outside of the record and were more properly addressed in the context of a CPL 440.10 motion.

http://nycourts.gov/reporter/3dseries/2019/2019_04233.htm

***People v White*, 5/30/19 – YO STATUTE / COMPLIANCE**

The defendant appealed from judgment of Schenectady County Court, convicting him of 3rd degree criminal possession of a controlled substance. The **Third Department** affirmed. Although the defendant's challenge to the voluntariness of his plea and his ineffective assistance claim—to the extent that it impacted the voluntariness of his plea—survived the valid appeal waiver, the issues were unpreserved for review, despite the defendant having ample opportunity to make an appropriate post-allocation motion prior to sentencing. County Court's misstatement as to the defendant's sentencing exposure was corrected on the record well in advance of the plea; and such misstatement standing alone would not have rendered the plea involuntary. The balance of the ineffective assistance claim could be advanced via a 440 motion, not on direct appeal.

http://nycourts.gov/reporter/3dseries/2019/2019_04234.htm

***People v Haggar*, 5/30/19 – COUNSEL / EFFECTIVE ASSISTANCE**

The defendant appealed from a judgment of Schenectady County Court, convicting him of CPW 2. The **Third Department** affirmed, rejecting the contention that the defendant received ineffective assistance of counsel. In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt upon the apparent effectiveness of counsel. Here, the record reflected that counsel pursued appropriate pretrial motions and negotiated an advantageous plea that reduced the defendant's sentencing exposure.

http://nycourts.gov/reporter/3dseries/2019/2019_04235.htm

EDITOR'S NOTE

The June 10 edition of ILSAPP DECISIONS OF INTEREST contains summaries of five Appellate Division decisions, all rendered last week, reversing judgments based on ineffective assistance claims (all non-immigration issues; three direct appeals from judgments upon guilty pleas; one 440 motion denial; one trial). All ILSAPP DECISIONS OF INTEREST are posted to the ILS website under Appellate Representation, usually within two weeks of dissemination via the listserv. For a copy of the latest DECISIONS, or to be added to the ILSAPP listserv, providing criminal and family law decisions (with a focus on reversals/modifications), please contact Cynthia Feathers: cynthia.feathers@ils.ny.gov.